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IN THE SUPREME COURT OF THE STATE OF UTAH

THE COMMITTEE OF CONSUMER
SERVICES,

Petitioner,

5.

UTAH PUBLIC SERVICE
COMMISSION,

Respondent.

**RULE 19 PETITION FOR
EXTRAORDINARY RELIEF
AND MEMORANDUM OF POINTS
AND AUTHORITIES**

PSCU Docket Nos. 98-057-12;
99-057-20; 01-057-14;
03-057-05

Case No. _____

Pursuant to Rule 19 of the Utah Rules of Appellate Procedure, and Rule 65B of the Utah Rules of Civil Procedure, the Utah Committee of Consumer Services (“Committee”) petitions the Supreme Court of the State of Utah (“Court”) for extraordinary relief in consequence of the December 17, 2003 order (“Order”) by the Public Service Commission of Utah¹ (“Commission”) that subverts the August 1, 2003, reversal without remand

¹December 17, 2003 Order in Docket Nos. 98-057-12, 99-057-20, 01-057-14, and 03-057-05. This Commission’s Order is attached under Exhibit 6.

decision of this Court in *Committee of Consumer Services v. Public Service Commission*, 2003 UT 29, 75 P.3d 481 (Utah 2003).²

1. PERSONS WHOSE INTERESTS MIGHT BE SUBSTANTIALLY AFFECTED

The persons whose interests might be substantially affected by this Petition are: (1) the Public Service Commission of Utah; (2) the public utility, Questar Gas Company; (3) its owner, Questar Corporation; and (4) utility ratepayers burdened by the Commission's orders, a substantial majority of whom are residential and small commercial business, including farming and ranching, utility customers represented by the Committee.

2. ISSUES PRESENTED AND RELIEF SOUGHT

The issues presented are:

- A. Whether the Commission's Order, and related actions, comply with the mandate of this Court; and
- B. Whether, absent changed circumstances, the Commission can modify *post appeal* its evidentiary determination that was the subject of appellate resolution and the basis upon which the Court finally disposed of the issue of rate recovery.

The Committee petitions this Court to compel the Commission to comply with the Court's decision.

²This Court's opinion is attached under Exhibit 2. Hereafter the decision will be referred to as "the Court's decision."

3. STATEMENT OF RELEVANT FACTS

The Court's decision reversed, without remand, the Commission's August 11, 2000 Report and Order³ to the extent that order allowed the Utah public utility, Questar Gas Company ("Questar Gas" or "utility"), to recover its CO₂ gas processing costs in rates. The Commission's order had allowed rate recovery on the grounds the costs paid for a "required result,"⁴ notwithstanding its conclusive determination that the utility failed to provide a

³August 11, 2000 Report and Order in Docket No. 99-057-20, pp. 28-36. A relevant excerpt of this order is attached under Exhibit 1.

⁴Commission's August 11, 2000 Report and Order in Docket 99-057-20, page 35. This Court's decision termed the Commission's "required result" analysis a "safety exception." The language from the Commission's order states:

sufficient record demonstrating those costs were prudently incurred and not influenced by affiliate interests.⁵

Clearly, QGC has the burden to demonstrate the decision to enter the contract is a prudent one. Parties differ as to whether it did so successfully. But whether or not QGC met this burden, we can and do conclude that its decision to procure gas processing has yielded the required result, that is, it has effectively protected the safety of its customers. This means the costs of gas processing can be legitimately recovered in rates.

⁵The Commission's evidentiary determination, on page 34 of its August 11, 2000 Report and Order, states:

[t]he record is insufficient to permit us to determine whether the Company's analysis of options prior to early 1998 was sufficiently objective and thorough, that is, to reach a conclusion whether options were ruled in or out as a result of the influence of affiliate interests. Nor can a sufficient record be developed.

The Court's decision concluded an appeal in which the Committee contended that the Commission either: (1) failed to address the prudence of the utility's actions or, in the alternative, (2) erred in not denying rate recovery after having determined the record was insufficient to permit a prudence analysis.⁶ The meaning and legal effect of the

⁶The second of two major arguments of the Committee on appeal was:

[t]he Commission erred in not dismissing the Company's Application for failure to prove affiliate interests did not influence the selection of the CO₂ Plant. [October 1, 2002 Opening Brief of the Committee].

The primary argument of Intervenor Crossroads Urban Center and Salt Lake Community Action Program on appeal was:

[t]he record before the PSC did not provide a basis to determine that the rate increase was just and reasonable. [Opening Brief of Intervenor Crossroads Urban Center and Salt Lake Community Action Program].

Commission's evidentiary determination were further highlighted as the third of eight

Issues on Review in the Committee's opening brief:

Whether the Commission can allow utility costs into customer rates notwithstanding its explicit finding that it could not determine if other cost options were ruled in or out as a result of affiliate interests.⁷

⁷Opening Brief of the Committee of Consumer Services, p. 2.

This Court's subsequent reversal without remand decision rejected the Commission's rationale that allowed rate recovery on the basis of a "required result" or "safety exception" to the utility's burden of demonstrating that the processing costs were prudently incurred.⁸ It then considered and upheld the Commission's determination of an insufficient prudence record, and concluded that determination was dispositive of the question of rate recovery. In the words of this Court:

If the record had permitted, the Commission could have carried out its initial obligation to review the prudence of the CO₂ plant contract and its terms, holding Questar Gas to its burden of establishing that its decision to enter into the contract and the costs it agreed to were prudent and not unduly influenced by its affiliate relationship with Questar Pipeline. Since the Commission found that no such record was or could be made available, it should have refused to grant a rate increase that included CO₂ plant costs. We therefore overturn the Commission's decision to accept the CO₂ Stipulation and to grant the rate increase proposed therein.⁹

⁸The Court stated:

We hold that the Commission's safety rationale is neither an adequate nor a fair and rational basis for departing from its prudence review standard. While safety concerns may have necessitated the construction and operation of a CO₂ plant, they do not establish who should bear the cost of these measures. [Paragraph 13 of the Court's decision.]

⁹The Court's decision, Paragraph 13.

The final words of the Court’s decision are: “[w]e reverse the Commission’s order and reject the rate increase proposed by the CO₂ Stipulation.”¹⁰ No remand, or other words indicating that a continuation of these proceedings by the Commission was expected or appropriate, are to be found in the decision.

¹⁰*Ibid.*, Paragraph 16.

On August 8, 2003, the Committee petitioned the Commission to set new rates complying with the Court's decision, and to address the question of a refund to ratepayers of past costs collected by the utility under the now-rejected rates.¹¹ On August 26, 2003, the Commission ordered the Committee, Questar Gas, and other interested parties to file briefs regarding "threshold jurisdictional and procedural issues; including the Commission's authority in light of the [Court's] decision."¹² Upon completion of three rounds of briefing and oral argument, the Commission, in a December 17, 2003 order, ("Order")¹³ concluded that its prior evidentiary determination of an insufficient prudence record was not the "finding of fact or conclusion of law" it "appear[ed]" to be; but was instead "an ambiguous use of dicta."¹⁴ The Commission then stated:

¹¹ August 8, 2003 Petition to Adjust Questar Gas Company's 191 Pass-through Account. Docket No. 03-057-05. A copy of this Petition is attached under Exhibit 3.

¹² August 26, 2003, Scheduling order in Docket Nos. 98-057-12, 99-057-20, 01-057-14, and 03-057-05. A copy of this order is attached under Exhibit 5.

¹³ December 17, 2003 Order in Docket Nos. 98-057-12, 99-0457-20, 01-057-14, and 03-057-05. A copy of this order is attached under Exhibit 6.

¹⁴ *Ibid.*, p. 4.

Wherefore, we conclude that the parties should now have the opportunity to marshal the evidence from the existing records in Dockets 98-057-12 and 99-057-20 relating to the prudence of Questar's actions and decisions. We will then determine whether Questar has met its burden to show that its actions were prudent and that inclusion of any costs relating to remedial actions affecting CO₂ levels in the natural gas delivered to customer (sic) results in just and reasonable rates. We have set a Scheduling Conference to confer with the parties in order to set the dates on which the parties may make their presentations on these issues.¹⁵

4. NO OTHER PLAIN, SPEEDY, OR ADEQUATE REMEDY EXISTS

This Court's reversal without remand decision finally denied Questar Gas rate recovery of its gas processing costs in these proceedings. The Commission's Order wrongly denies utility ratepayers the benefit of that appellate decision and subjects them again to uncertainty and financial risk.

It is wrong to put ratepayers to the expense, effort, and risk of having to re-secure the benefit of the Court's decision simply because the Commission, without just cause and out of season, re-interprets the evidentiary determination that was the subject of appellate review and resolution and the basis of appellate relief. The Commission's order cites no new compelling evidence or change of circumstance for its action. In fact, it specifically states the analysis will be confined to "evidence from the existing records."¹⁶ The modification is "out of season" because, as set forth in the Statement of Relevant Facts above, the meaning and legal effect of its evidentiary determination were critical issues on

¹⁵*Ibid.*, p. 6.

¹⁶Commission's December 17, 2003 Order, p. 6.

appeal. The Commission never, at that appropriate time, argued or protested that its evidentiary determination meant anything other than what it plainly says.

In addition to the unwarranted harm and risk to utility ratepayers, the Commission's arbitrary action contravenes the mandate of this Court and subverts a final appellate decision. Generally, but no less importantly, the predictability and accountability essential to effective and just public utility regulation are undermined by arbitrary actions such as this that modify, without just and sufficient cause, prior regulatory determinations that affected parties rely upon and expect were made in a responsible manner.

Utility ratepayers have no right of interlocutory appeal under the Administrative Procedures Act of Utah.¹⁷ Other than this Petition for Extraordinary Relief, there is no speedy or adequate remedy for the Commission's actions. Waiting to appeal the Commission's *post appeal* re-interpretation of the evidentiary determination, until a final Commission order issues in consequence of the pending prudence analysis, puts ratepayers at the needless continued risk that attendant delay and not yet foreseeable future circumstances may yet undermine or, in practical ways, prevent such later appellate relief.¹⁸

¹⁷In *Prince v. Collection Division of the State Tax Commission*, 974 P.2d 284, 285 (Utah 1999), this Court ruled that its appellate jurisdiction is limited to final agency actions:

Because the Tax Commission plans to further consider the action on the merits, there was no final agency action in the matter of Prince's assessment; where there is no final agency action, this court lacks jurisdiction. *See* Utah Code Ann. §§ 63-46b-16(1) & 78-2-2(3)(e).

¹⁸The legal issue whether the Commission's Order subverts this Court's decision may abide undamaged for later appeal; but in the real world, where the merits of progressing such an appeal must be measured against the offsetting time, costs and risks that can only be known and assessed at that time, an appeal to re-secure what was lost may be found to be too costly and uncertain. *If* this Court's decision means what it says, ratepayers should not have to face those risks and uncertainties a second time in this case.

5. THIS PETITION PROPERLY LIES WITH THIS COURT

This Court finally disposed of these proceedings with its August 1, 2003 decision.

It is that mandate and that decision which are being contravened.

6. COPIES OF RELEVANT COMMISSION ORDERS AND EXCERPTS FROM RECORD

The following documents are provided as Exhibits 1 through 6 attached at the end of

Petition:

1. Excerpt of August 11, 2000 Report and Order of the Public Service Commission. Docket No. 99-057-20. Included in the excerpt are all pages from the beginning through Background and Procedural History,” and then pages 28-42, which are the Commission’s CO₂ gas processing costs analysis and decision.
2. August 1, 2003, Decision of this Court in *Committee of Consumer Services v. Public Service Commission of Utah*, 2003 UT 29, 75 P.3d 481 (Utah 2003).
3. August 8, 2003 Petition of the Committee of Consumer Services to Adjust Questar Gas Company’s 191 Pass-through Account. PSC Docket 03-057-05.
4. August 11, 2003 Commission Notice of Scheduling Hearing in PSC Docket Nos. 98-057-12; 99-057-20; and 01-057-14.
5. August 26, 2003 Commission Scheduling Order in PSC Docket Nos. 98-057-12; 99-057-20; 01-057-14; and 03-057-05.
6. December 17, 2003 Commission Order in PSC Docket Nos. 98-057-12; 99-057-20; 01-057-14; and 03-057-05.

7. MEMORANDUM OF POINTS AND AUTHORITIES

This Court finally denied Questar Gas rate recovery of the costs at issue by giving legal effect to the Commission's determination that the evidentiary record was insufficient – "[n]or can a sufficient record be developed"¹⁹ – to permit a prudence analysis:

[s]ince the Commission found that no such record was or could be made available, it should have refused to grant a rate increase that included CO₂ plant costs. We therefore overturn the Commission's decision to accept the CO₂ Stipulation and to grant the rate increase proposed therein.²⁰

The Court's decision specifically notes the Commission's acknowledgment in earlier proceedings that the utility bears the evidentiary burden of demonstrating the prudence of its actions as a prerequisite to rate recovery:

¹⁹See footnote 5, above for an entire statement of the Commission's evidentiary determination.

²⁰Court's decision, Paragraph 13.

We note further that the Commission does not contest Consumer Services's claim . . . that this prudence determination is a prerequisite to the determination whether a consequent rate increase is just and reasonable. In fact, as noted above, the Commission explicitly recognized these obligations in its original 1998 report and order.²¹

Once this Court had rejected the Commission's safety exception rationale, it was left with the Commission's evidentiary determination, and concluded that determination was dispositive of these proceedings: the Commission set the prudence standard; the Commission concluded Questar Gas did not provide sufficient evidence to permit a determination whether it met that standard; end of case.

Subsequent to this Court's decision, and rather than adjusting Questar Gas' utility rates to reflect the Court's denial of rate recovery, the Commission decided to reopen these proceedings to undertake the prudence analysis it previously determined the record would not permit. Its decision is based upon no plea of new evidence, compelling or otherwise, or any changed conditions that might justify a revisit of its prior determination – indeed, it states its analysis will be confined to the existing record.²²

²¹*Ibid.*, Paragraph 12.

²²December 17, 2003 Order, p. 6.

With regard to its prior determination of an insufficient record, the Commission now states: “[t]his appears as a finding of fact or conclusion of law. It was not. Rather, it was an ambiguous use of dicta . . .”²³ and that it “has not yet put Questar to its burden of proof that its decisions were prudent and rates including some, if any, recovery of processing costs are just and reasonable.”²⁴

The Commission’s actions appear patently arbitrary and unwarranted; and they are. The meaning and legal effect of its earlier evidentiary determination were central issues on appeal before this Court – ones which the Commission was duty-bound to rectify if it then thought the wording was misleading or unintended. The Commission never made any such timely clarification of its determination, or otherwise contested the Committee’s and Intervenor Crossroads Urban Center’s and Salt Lake Community Action Program’s view of its legal effect.

This Court specifically reviewed and upheld that evidentiary determination, and concluded it was dispositive of these proceedings. The determination is, thus, no longer one which the Commission is free to modify or re-interpret at its discretion. Absent changed circumstances, the Commission is without authority to modify or re-interpret a prior determination once examined and given legal effect by this Court, or to otherwise not promptly conform its actions to the mandate of the Court.

²³*Ibid.*, p. 4.

²⁴December 17, 2003 Order, p. 5.

In *Nance v. Sheet Metal Workers International Association*, this Court overturned a lower court's entry of "amended judgment" in response to this Court's earlier reversal without remand decision. The remittitur in that earlier reversal proceeding stated:

It is now ordered, adjudged and decreed that the judgment of the district court herein be, and in the same is, reversed. Costs before the jury trial to respondents and those thereafter to appellant.²⁵

This Court concluded upon subsequent review:

It is the contention of the defendant union on this appeal that the remittitur of this court was self-executing, and that the lower court's amended judgment is not in conformity therewith. With this contention we agree.²⁶

In a similar manner, the Court in this case reversed the Commission's grant of rate recovery without remand for further findings. The case came back concluded with respect to the issue of rate recovery. The Commission's present duty is therefore not to re-interpret or otherwise contradict the findings and conclusions governing the Court's disposition, but rather to give legal effect to the decision.

²⁵*Nance v. Sheet Metal Workers International Association*, 375 P. 2d 249 (Utah 1962), at 249.

²⁶*Ibid.*

An even more explicit statement of a lower administrative agency's duty to conform its actions to the appellate court's decision is found in the recent case of *Bailey-Allen Co., Inc. v. Kurzet*:

Initially, we note that “ ‘pronouncements of an appellate court on legal issues . . . become the law of the case and must be followed in subsequent proceedings[;] . . . [thus,] the lower court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.’ ” *Slattery v. Covey & Co., Inc.*, 909 P.2d 925, 928 (Utah Ct. App. 1995) (quoting *Thurston v. Box Elder County*, 892 P.2d 1034, 1037-38 (Utah 1995) (citations omitted)). “Thus, it is only when issues are left open by an appellate decision that the trial court has discretion to deal with those issues as it sees fit, including allowing supplemental filings or proceedings.” *Id.*²⁷

This Court in *Thurston v. Box Elder County*, quoted in the above Court of Appeals statement, further states with regard to the “law of the case” and consequent “mandate” to the lower court or administrative body:

The mandate must be followed even though the lower court subsequently addressing the issue may believe that the issue could have been better decided in another fashion. *Petty*, 113 Utah at 215, 192 P. 2d at 594; *Davis v. Payne & Day, Inc.*, 12 Utah 2d 107, 108-09, 363 P.2d 498, 499 (1961); *Helper State Bank v. Crus*, 95 Utah 320, 325, 81 P.2d 359, 361 (1938); *Forbes v. Butler*, 73 Utah 522, 525, 275 P. 772, 773 (1928). This serves the dual purpose of protecting against the re-argument of settled issues and of assuring adherence of lower courts to the decisions

²⁷*Bailey-Allen Co., Inc., v. Kurzet*, 945 P.2d 180, 185 (Utah App. 1997).

of higher courts. *People v. Roybal*, 672 P.2d 1003, 1005 (Colo. 1983) (en banc).²⁸

In the present instance there can be no question that this Court specifically reviewed and upheld the Commission's determination of an insufficient record in concluding the determination was dispositive of Questar Gas' application for rate recovery. There is, therefore, absent compelling new evidence or changed circumstances, no legal justification or basis – there is no legal right or authority – for the Commission's *post appeal* unilateral re-interpretation of the meaning and legal effect of that determination.

²⁸*Thurston v. Box Elder County*, 892 P.2d 1033, 1038 (Utah 1995).

While the Commission may normally have the authority to reconsider its decisions in the absence of statutory provisions to the contrary,²⁹ such authority is necessarily circumscribed once the decision has been the subject of appellate court review and disposition. That legal principle is clear even in the Utah case of *Phebus v. Dunford*,³⁰ which the Commission's Order asserts supports its view that the Court's decision leaves the Commission free to re-interpret its prior evidentiary determination of an insufficient record and proceed with a prudence analysis and findings. Lifting out of context the statement in *Phebus* that "a reversal on appeal places the case in the position it was before the lower court rendered the judgment or decision that was reversed,"³¹ the Commission ignores the critical distinction that *Phebus* addresses a remand decision, and not, as in this case, a final disposition on appeal. Even more importantly, it ignores the critical qualifying restriction this Court attaches in that case to its "places the case in the same position" wording:

²⁹*Career Service Review Bd. v. Dept. of Correction*, 942 P.2d 933, 945. (Utah 1997).

³⁰*Phebus v. Dunford*, 198 P.2d 973 (Utah 1948).

³¹*Ibid.*, at 974.

The lower court's former decision, in its entirety, having been set aside, that court should proceed to a determination of the case the same as if no such previous decision by it had been rendered. The only restriction imposed upon it in accomplishing a final determination of the case lies in the issues decided upon the appeal to this Supreme Court. Those issues may not be acted upon or decided contrary to the way they were decided by this court.[Emphasis added.]³²

This latter statement is the real holding of *Phebus*. A lower court's or administrative agency's actions *post appeal* are clearly restricted by issues "acted upon" by the appellate Court; and that is also the prevailing administrative law standard in this country. With reference to administrative agencies, *Corpus Juris Secundum* states:

Judicial decisions on appeal from administrative decisions or orders determining questions of law are final and conclusive on the administrative body, and the administrative body is bound to honor such judicial decisions, and when its continuing jurisdiction conflicts with a prior judicial determination, it may act only in a changed situation. Thus, the power of the administrative body to modify or change its decision is terminated as to questions decided on the appeal.³³

³²*Ibid.*

³³73A C.J.S., **Public Administrative Law and Procedure** § 258.

The one exception noted by *Corpus Juris Secundum* to this compliance standard – that of a “changed situation” – is not applicable in this instance, since the Commission specifically states its prudence determination will be based upon the existing record.³⁴

As further support for its *post appeal* actions, the Commission asserts:

³⁴Commission’s December 17, 2003 order, p. 6.

The Commission cannot abdicate its responsibility to analyze the evidence regarding the prudence of Questar's decisions and determine whether any rate increase which includes some, if any, recovery of gas processing costs is just and reasonable. To do otherwise, as requested by the Committee, would be to impermissibly let the court usurp the Commission's legislative authority to set just and reasonable rates.³⁵

The Commission here engages in doublespeak. Of course it can not abdicate its responsibility to analyze the evidence. Presumably it analyzed the evidence when it determined the record was insufficient in the first place. Its determination was deliberately undertaken. It appears as the first critical finding in its "safety exception" analysis, and is thus substantially more than "ambiguous use of dicta." The Commission had earlier clarified, with reference to the prospect of these very proceedings, that the affiliate transactions involved require that Questar Gas meet a heightened prudence standard as a prerequisite to rate recovery.³⁶ Given its own mandatory prudence standard, the Commission's "safety exception" analysis would have appeared even more ungrounded had it not first recorded its determination that the record would not permit a prudence analysis. And the apparent contextual meaning of its evidentiary determination is exactly as this Court concluded: *if* there had been a sufficient prudence record the Commission would

³⁵*Ibid.*, p. 5.

³⁶Commission's December 3, 1999 Report and Order. Docket No. 98-057-12, p. 7, footnote 2. This Court discusses this statement of the Commission in Paragraph 12 of its decision as well. See footnote 21, above.

have made the requisite prudence analysis. Its *post appeal* unilateral re-interpretation of that determination, in the absence of any compelling new evidence or changed circumstances, therefore appears arbitrary and unjustified; and it is.

The Court's final disposition of these proceedings usurps no authority of the Commission to set rates. It simply gives legal effect to the Commission's own prior analysis and determination. How can the Commission lawfully proceed to set new rates where – in its own words – the utility failed to provide a sufficient prudence record that would permit just and reasonable rate making?

This Court concluded that Questar Gas failed to meet its burden of proof, and the Commission “erred by failing to hold Questar Gas to its burden of showing that the [rate] increase was just and reasonable.”³⁷ It is the utility's burden “to prove it is entitled to rate relief and not [that of] the Commission, the Commission staff, or any interested party or protestant, to prove the contrary.”³⁸ That is the law of this case, and the mandate which the Committee petitions this Court to compel the Commission to comply with.

PRAYER FOR RELIEF

The Committee respectfully petitions this Court to order the Commission to abide by, and give prompt operative effect to, the Court's August 1, 2003, decision that finally denied Questar Gas rate recovery of its gas processing costs in these proceedings.

³⁷The Court's decision, Paragraphs 14-16.

³⁸*Ibid.*, Paragraph 14, quoting from *Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n*, 614 P.2d 1242, 1245 (Utah 1980).

Respectfully submitted this _____ day of January, 2004.

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CERTIFICATE OF SERVICE

I certify that I mailed or hand-delivered the foregoing **RULE 19 PETITION FOR EXTRAORDINARY RELIEF AND MEMORANDUM OF POINTS AND AUTHORITIES** this _____ day of January, 2004 to:

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